STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 30, 2002
v D'ANDRE D. CALLOWAY, Defendant-Appellant.	No. 232225 Wayne Circuit Court LC No. 00-011741

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v D'ANDRE D. CALLOWAY, Defendant-Appellant.	No. 232274 Wayne Circuit Court LC No. 00-008931-01

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to do great bodily harm, MCL 750.84; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to concurrent terms of 95 months' to 15 years' imprisonment for the assault charge and 47 months' to 7 1/2 years' imprisonment for the felon in possession charge. These sentences were to be served consecutive to 5 years' imprisonment for the felony-firearm charge. Defendant appeals as of right. We affirm.

On July 1, 2000, Shannon Gaines was shot in the chest, leg, and buttocks. Mr. Gaines testified that on the day of the shooting he was going to visit a friend's grandmother who lived down the street from him. According to Mr. Gaines, he rode his bicycle to the house and noticed defendant sitting on the porch. Mr. Gaines claimed that after he stopped in front of the house, defendant asked if he would sell drugs for him. When he refused, Mr. Gaines alleged that defendant pulled a "grayish" revolver out of his blue jeans and began shooting at him. Throughout the trial, Mr. Gaines maintained that he never possessed a weapon or confronted

defendant on the porch. Mr. Gaines was shot four times before running into the street and crawling under a truck. The officer responding to the scene did not find any weapons.

Under cross-examination, Mr. Gaines stated that he did not know why defendant would have expected him to sell drugs. Mr. Gaines stated further that he told defendant he was not selling drugs for anybody because he was just released from prison for "capias from court." Apparently, the capias was issued for Mr. Gaines' failure to appear in court for a pending automobile theft charge. Upon further questioning, Mr. Gaines admitted that he was selling drugs when the police arrested him for failing to appear in court. Mr. Gaines also admitted that he lied to the police about his name in the past, but maintained that he was a "truth-teller".

Defendant elected to testify on his own behalf at trial. According to defendant, he was waiting on the porch to invite a friend to a fish fry at his grandmother's house. Defendant claimed that while he was waiting, Mr. Gaines came onto the porch. Defendant alleged that Mr. Gaines began accusing him of being a snitch to the police with regard to Mr. Gaines' drug activities. Defendant testified that they exchanged words until Mr. Gaines pulled a gun from his shorts and attempted to hit defendant with it. At that point, defendant stated that he grabbed the gun before Mr. Gaines could hit him. Defendant admitted to firing the gun during the exchange. As Mr. Gaines was attempting to leave the porch, defendant stated that he fired the gun again and then fled the scene. Defendant estimated that the weapon fired three times. After the shooting, defendant stated that he took the weapon to Ms. Christine Radden's[1] house because he was living with his grandmother and he did not want to bring gang trouble to her house. Defendant denied selling drugs or asking Mr. Gaines to sell drugs for him.

Defendant claimed that he did not go to the police because of the potential repercussions. He also testified that he never told Ms. Radden that he brought a gun into her home. Defendant explained that he did not tell the police about the gun after his arrest because "it never came up." However, defendant admitted that he was ineligible to carry a firearm because of a prior conviction.[2] He stated that carrying a firearm was against his religion.

Cynthia Dixon, an eyewitness to the shooting, was a neighbor of Mr. Gaines. Ms. Dixon testified that she was outside standing on her driveway when she heard something that sounded like firecrackers. When Ms. Dixon looked up the street she saw two young black males jump off a porch and run towards the street.[3] Ms. Dixon testified that she recognized the person being chased as Mr. Gaines. However, Ms. Dixon claimed she could not identify his pursuer because of the distance, the fact everything happened so fast, and because her main focus was on Mr. Gaines. According to Ms. Dixon, Mr. Gaines' pursuer was shooting a gun and yelling "bitch" repeatedly at Mr. Gaines.[4] After the weapon fired three or four times, Ms. Dixon claimed that

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[1] At the time of the incident, defendant and Ms. Radden were boyfriend and girlfriend. They have a son who lives with Ms. Radden.

[2] The parties stipulated that defendant was a felon for purposes of MCL 750.224f and that he was ineligible to possess a firearm at the time of the shooting.

[3] Ms. Dixon testified that she lived six houses down from where the shooting occurred.

[4] Defendant denied this and claimed that the cursing occurred on the porch before the gunshots.

the shooter fled the scene. Upon arriving at the scene, Ms. Dixon observed that Mr. Gaines was shot and bleeding profusely. Ms. Dixon did not recall seeing any weapon near Mr. Gaines and testified that he was wearing long shorts and a tee-shirt. According to Ms. Dixon, a small crowd arrived at the scene before police arrived.

Mr. James Strickland was also an eyewitness to the shooting. After several unsuccessful attempts to locate Mr. Strickland for trial, the parties stipulated to admit the statements he made to police into evidence. Mr. Strickland informed the police that he was talking to Ms. Dixon when the shooting occurred. He further stated that he saw Mr. Gaines come off a porch and try to get away from a man that was shooting at him with a .357.[5] Mr. Strickland described the shooter as being brown-skinned, bald, and nicely built. Mr. Strickland further stated that the shooter was dressed in blue jeans and a white tee-shirt.

Defendant's former girlfriend, Christine Radden, testified that she contacted the Highland Park Police Department in September 2000, after finding a weapon in her home. Ms. Radden claimed that it was not her weapon and that she discovered it in a bag belonging to one of defendant's other girlfriends. Ms. Radden stated that the weapon in evidence looked like the gun she turned over to police. However, Ms. Radden further testified that she thought the handle was a different color but that she could not really remember.

Detective Sergeant Robert Howard testified that he retrieved the Smith and Wesson .357 caliber Magnum revolver in evidence from Ms. Radden's home. According to Detective Howard, the weapon was loaded when he submitted the gun and a bullet retrieved from Mr. Gaines' body, to the Michigan State Police. Detective Howard also took several statements from Mr. Gaines. In the first statement, Mr. Gaines identified defendant as his attacker.

The parties stipulated to the contents of the ballistic expert's report. The report concluded that the weapon taken from Ms. Radden's home fired the bullet that was retrieved from Mr. Gaines body.

I. Double Jeopardy

Defendant initially argues that his convictions and sentences for felon in possession of a firearm and felony firearm violate federal and state constitutional prohibitions against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. We disagree. Whether double jeopardy applies is generally a question of law that this Court reviews de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). However, because defendant failed to properly preserve this issue for appeal, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

This Court previously addressed this precise issue in *People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001), and held that convictions for felony-firearm and felon in possession do not violate the prohibition against double jeopardy. According to *Dillard, supra* at 167-171, the felony-firearm and felon in possession statutes prohibit different crimes and address distinct

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[5] .357 revolver.

social norms. We further note that the *Dillard* opinion is binding precedent under MCR 7.215(I). Thus, defendant has failed to establish plain error.

II. Inaccuracies in the Presentence Report

During sentencing, defendant challenged the accuracy of the presentence report. Specifically, defendant argued that the guidelines on the second page of the presentence report were incorrect and should have been corrected to 38-95 years for the assault charge and 22-47 years for the felon in possession charge. Defendant also contested the agent's description of the offense. He argued that Mr. Gaines was not totally believable given the fact that the jury convicted him of a reduced charge. The trial court granted defendant's request to modify the guidelines on the second page of the presentence report.

On appeal, defendant contends that these changes were not made to the presentence report and that a remand for corrections is necessary. According to MCL 771.14(6),

> [i]f the court finds on the record that the challenged information is inaccurate or irrelevant, that finding *shall* be made a part of the record, the presentence investigation report *shall* be amended, and the inaccurate or irrelevant information *shall* be stricken accordingly before the report is transmitted to the department of corrections. [Emphasis added.]

With respect to the sentencing guidelines, the record indicates that the trial court granted defendant's request to change the sentencing guidelines on the presentence report. A review of the presentence report shows that the sentencing guidelines were edited in pen. We find that the appropriate corrections were made to the presentence report and this opinion shall serve as proof of this. Thus, remand for further corrections is unnecessary.

Moreover, we conclude that the record does not support defendant's contention that the agent's description of the offense, which appears to be a recap of the complainant's testimony, be redacted. The trial court noted that the complainant was not the most believable person and that for this reason it was going to stay within the sentencing guidelines. The following colloquy occurred between defense counsel and the trial court during sentencing:

> *Mr. Cook* And I could understand what the agent's description of the offense was, Your Honor, but the court heard the testimony and I think even Mr. Hutting at the time of the trial admitted that . . . the complainant might not be totally believable, and I think it was based upon that that we got the reduced verdict that we did.
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> *The Court* Yeah, that was a successful argument on behalf of the defense, reducing it from Assault With Intent to Murder to Assault With Intent to Cause Great Bodily Harm Less Than Murder. Obviously we did not have the most virtuous of complainants, to say the least, and with his own admission of additional car theft I believe that everybody was unaware of in addition to his drug charges. Nonetheless—and obviously I am aware of this, and because of that, I'm not going to be departing from the guidelines which the legislature mandates.

While the trial court acknowledged that the charge may have been reduced based on the complainant's lack of credibility, it did not specifically discount the agent's total description of the offense. Therefore, redaction is not mandated under MCL 771.14(6).

III. Jury Instructions

Defendant further maintains that the trial court erred when it failed to sua sponte instruct the jury on the defense of innocent possession. We disagree. This Court reviews de novo a defendant's claim of instructional error. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). However, because defendant failed to preserve this issue, our review is limited to plain error affecting his substantial rights. *Carines, supra* at 763-764.

It is the function of the trial court to clearly present the case to the jury and instruct them on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Jury instructions must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). "The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court." *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

Even if the trial court was required to sua sponte instruct the jury on defendant's theories, the evidence in this case failed to support an instruction on innocent possession. Innocent possession is considered to be a very limited defense to a charge of weapons possession. *People v Coffey*, 153 Mich App 311, 314; 395 NW2d 250 (1986). Pursuant to *Coffey, supra* at 315, the brief possession of a weapon after disarming a wrongful possessor is a valid defense to a weapons possession charge "if the possessor had the intention of delivering the weapon to the police at the earliest possible time." In the instant case, defendant made no claim that he ever intended to turn the weapon over to police. Rather, defendant hid the weapon at Ms. Radden's home. Defendant further stated that he did not inform the police of the weapon's whereabouts because it "never came up." Absent evidence of an intent to deliver the weapon to police, the defense of innocent possession is inapplicable. Thus, defendant has failed to establish any error by the trial court.

IV. Ineffective Assistance of Counsel

Defendant, in propria persona, asserts that his trial counsel was ineffective for failing to investigate an insanity defense despite knowledge that defendant was being treated for a mental disorder. We disagree. Because defendant failed to raise this issue before the trial court, our review is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error warrants reversal only when it is a plain error that affects a defendant's substantial rights. *Carines, supra* at 763-764.

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel and he must overcome the strong presumption that counsel's performance was sound trial strategy; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that but for

counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

"A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). A substantial defense is any defense that might have changed the trial's outcome. *Id.* According to defendant, his trial counsel was aware that he was receiving treatment for a bipolar mental disorder. Defendant claims that he informed his trial counsel that he was on a psychotropic medication for his disorder and that trial counsel actually visited him on the mental health floor in the Wayne County Jail. According to defendant, his previous psychiatric history was also noted in the presentence report. Defendant further contends that he wrote a letter to his trial counsel regarding a psychologist's recommendation that defendant receive a mental health evaluation.

The information regarding defendant's psychiatric problems comes solely from defendant over six months after his appellant counsel filed his brief in the instant appeal and over a year after defendant's conviction and sentence. The presentence report indicates that defendant stated he took Prozac for a bipolar disorder, but there is no further record of the extent of his mental health. We further note that given the evidence presented, defendant has failed to overcome the strong presumption that his trial counsel's decision to pursue a theory of self-defense, as opposed to an insanity defense, was sound trial strategy. See *Carbin, supra* at 599-600.

Affirmed.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Jane E. Markey